

SENATE BILL 2016

By Burchett

AN ACT to amend Tennessee Code Annotated, Title 47, Chapter 25, relative to certain retail agreements for the sale and service of motorcycles and off-road vehicles.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 47, Chapter 25, is amended by adding Sections 2 through 15 of this act as a new part thereto.

SECTION 2. This part shall be known and may be cited as the "Motorcycle and Off-Road Vehicle Dealer Fairness Act".

SECTION 3. As used in this part, unless the context otherwise requires:

(1) "All-terrain vehicle" means a motorized flotation-tire vehicle with not less than three (3) low-pressure tires, but not more than six (6) low-pressure tires, that is limited in engine displacement to eight hundred cubic centimeters (800 cc) or less and in total dry weight to less than eight hundred fifty pounds (850 lbs.) and that has a seat or saddle designed to be straddled by the operator and handlebars for steering control;

(2) "Attachment" means a machine or part of a machine designed to be used on and in conjunction with a motorcycle or off-road vehicle;

(3) "Current model" means a model listed in the supplier's, wholesaler's, manufacturer's or distributor's current sales manual or any supplements thereto;

(4) "Current net price" means the price listed in the supplier's price list or catalogue in effect at the time the contract is canceled or discontinued, less any applicable trade and cash discounts;

(5) "Dealer" means any person engaged in the business of selling and retailing inventory, who enters into a retail agreement, and who, under the terms of the

agreement receives inventory from the supplier; "dealer" also includes a franchisee who otherwise meets the requirements of a dealer;

(6) "Franchise" or "franchise agreement" means a written or oral agreement for a definite or indefinite period, in which a person grants to another person authority to use a trade name, trademark, service mark or related characteristic within an exclusive territory, or to sell or distribute goods or services, within an exclusive territory, at wholesale, retail, by lease agreement or otherwise; provided that a franchise is not created by a lease, license or concession granted by a dealer to sell goods or furnish services on or from premises which are occupied by the dealer-grantor primarily for its own merchandising activities;

(7) "Franchisee" means a person to whom a franchise is offered or granted;

(8) "Franchisor" means a person who grants a franchise to another person;

(9) "Inventory" means motorcycles, off-road vehicles, attachments and repair parts;

(10) "Motorcycle" means every motor vehicle having a seat or saddle for the use of the rider and designed to travel on not more than three (3) wheels in contact with the ground, including a vehicle that is fully enclosed, has three (3) wheels in contact with the ground, weighs less than one thousand five hundred pounds (1,500 lbs.), and has the capacity to maintain posted highway speed limits, excluding a tractor or motorized bicycle;

(11) "Net cost" means the price the dealer actually paid to the supplier for the inventory, less any applicable trade, volume, or cash bonus discounts, plus freight and set-up expense;

(12) "Off-road vehicle" means any off-road motorcycle, all-terrain vehicle, utility vehicle or dune buggy;

(13) "Retail agreement" means an agreement, including a franchise agreement that meets the requirements of a retail agreement, whether express, implied, oral, or written, between two (2) or more persons:

(A) By which a person receives the right to:

(i) Sell or lease inventory or services at retail or wholesale; or

(ii) Use a trade name, trademark, service mark, logotype, advertising, or other commercial symbol; and

(B) In which the parties to the agreement have a joint interest, whether equal or unequal, in the offering, selling, or leasing of the inventory or services;

(14) "Person" means a sole proprietor, partnership, corporation, or any other form of business organization;

(15) "Superseded part" means any part that will provide the same function as a currently available part as of the date of cancellation;

(16) "Supplier" means a person who enters into a retail agreement and who, under the terms of the agreement, provides inventory or services to a dealer. The term includes a:

(A) Wholesaler;

(B) Manufacturer;

(C) Franchisor;

(D) Person that is a parent corporation or an affiliated corporation of a person identified in this subdivision; and

(E) A field representative, an officer, an agent, or another direct or indirect representative of a person identified in this subdivision; and

(17) "Terminate" includes the failure to renew.

SECTION 4.

(a) No supplier, directly or through an officer, agent or employee, may terminate, cancel, fail to renew or substantially change the competitive circumstances of a retail agreement without good cause. "Good cause" means failure by a dealer to comply with requirements imposed upon the dealer by the retail agreement if such requirements are not different from those imposed on other dealers similarly situated in this state. In addition, good cause exists whenever:

(1) There has been a closeout on the sale of a substantial part of the dealer's assets related to the business, or there has been a commencement of a dissolution or liquidation of the dealer;

(2) The dealer has changed its principal place of business or added additional locations without prior approval of the supplier, which shall not be unreasonably withheld;

(3) The dealer has substantially defaulted under a chattel mortgage or other security agreement between the dealer and the supplier, or there has been a revocation or discontinuance of a guarantee of a present or future obligation of the dealer to the supplier;

(4) The dealer has failed to operate in the normal course of business for seven (7) consecutive days or has otherwise abandoned the business;

(5) The dealer has pleaded guilty to or has been convicted of a felony affecting the relationship between the dealer and the supplier; or

(6) The dealer transfers an interest in the dealership, or a person with a substantial interest in the ownership or control of the dealership, including an individual proprietor, partner or major shareholder, withdraws from the dealership or dies, or a substantial reduction occurs in the interest of a partner or major

shareholder in the dealership. However, good cause does not exist if the supplier consents to an action described in this subsection.

(b) Except as otherwise provided herein, a supplier shall provide a dealer with at least ninety (90) days' written notice of termination, cancellation or nonrenewal of the retail agreement and a sixty-day right to cure the deficiency. If the deficiency is cured within the allotted time, the notice is void. In a case where cancellation is enacted due to market penetration, a reasonable period of time shall have existed where the supplier has worked with the dealer to gain the desired market share. The notice shall state all reasons constituting good cause for termination, cancellation or nonrenewal of the retail agreement.

SECTION 5. Whenever any dealer enters into a retail agreement, evidenced by a written or oral contract, with a supplier wherein the dealer agrees to maintain an inventory of motorcycles, off-road vehicles, and attachments, inventory of parts and to provide service thereon, and the contract is terminated, then the supplier shall repurchase the inventory as provided in Section 7. The dealer may keep the inventory if the dealer desires. If the dealer has any outstanding debts to the supplier, then the repurchase amount may be set off or credited to the dealer's account.

SECTION 6. No supplier shall:

(1) Coerce any dealer to accept delivery of inventory, parts or accessories which the dealer has not ordered voluntarily, except as required by any applicable law, or unless parts or accessories are safety parts or accessories required by the supplier;

(2) Condition the sale of additional inventory to a dealer upon a requirement that the dealer also purchase other goods or services, except that a supplier may require the dealer to purchase those parts reasonably necessary to maintain the quality of operation in the field of the inventory used in the trade area;

(3) Coerce a dealer into refusing to purchase inventory manufactured by another supplier; or

(4) Terminate, cancel or fail to renew or substantially change the competitive circumstances of the retail agreement based on the results of a natural disaster, including a sustained drought or high unemployment in the dealership market area, labor dispute or other similar circumstances beyond the dealer's control.

SECTION 7.

(a) A dealer who enters into a written retail agreement with a supplier to maintain a stock of motorcycles, off-road vehicles, or related parts and attachments has the following rights to payment upon repurchase, at the option of the dealer, if the retail agreement is terminated:

(1) The supplier shall repurchase, at one hundred percent (100%) of the current net price, all new, unsold, undamaged and complete motorcycles, off-road vehicles and attachments;

(2) The supplier shall repurchase, at ninety percent (90%) of the current net price, all new, unused and undamaged and superseded repair parts;

(3) The supplier shall repurchase, at ten percent (10%) of the current net price, all new, unused and undamaged repair parts returned to cover the cost of handling, packing and loading. The supplier shall have the option of performing the handling, packing and loading in lieu of paying the ten percent (10%) for these services;

(4) The supplier shall purchase at its amortized value any specific data processing hardware and software and telecommunications equipment that the supplier required the dealer to purchase within the past five (5) years; and

(5) The supplier shall repurchase, at seventy-five percent (75%) of the net cost, specialized repair tools purchased in the previous three (3) years and, at fifty percent (50%) of the net cost, specialized repair tools purchased in the previous four (4) through six (6) years pursuant to the requirements of the supplier and held by the dealer on the date of termination. Such specialized repair tools must be unique to the supplier's product line and must be in complete and resalable condition.

(b) Motorcycles, off-road vehicles and attachments used in demonstrations, including inventory leased primarily for demonstration or lease, shall also be subject to repurchase under this part at its agreed depreciated value; provided, that such inventory is in new condition and has not been abused.

SECTION 8. Upon payment of the repurchase amount to the dealer, the title and right of possession to the repurchased inventory shall transfer to the supplier. Annually, at the end of each calendar year, after termination or cancellation, the dealer's reserve account for recourse, retail sale or lease contracts shall not be debited by a supplier or lender for any deficiency unless the dealer or the heirs of the dealer have been given at least seven (7) business days' notice by certified or registered United States mail, return receipt requested, of any proposed sale of the inventory financed and an opportunity to purchase the inventory. The former dealer or the heirs of the dealer shall be given quarterly status reports on any remaining outstanding recourse contracts. As the recourse contracts are reduced, any reserve account funds shall be returned to the dealer or the heirs of the dealer in direct proportion to the liabilities outstanding.

SECTION 9. This chapter does not require repurchase from a dealer of:

(1) Any repair part which, because of its condition, is not resalable as a new part;

(2) Any inventory for which the dealer is unable to furnish evidence of title and ownership in the dealer that is free and clear of all claims, liens and encumbrances to the satisfaction of the supplier;

(3) Any inventory which a dealer desires to keep, provided the dealer has a contractual right to do so, pursuant to the retail agreement;

(4) Any motorcycle, off-road vehicle and attachments, which are not in new, unused, undamaged, complete condition; provided, that the inventory used in demonstrations or leased as provided in Section 7(b) shall be considered new and unused;

(5) A repair part which is not in new, unused, or undamaged condition;

(6) A motorcycle, off-road vehicle, or attachment which was purchased more than forty-eight (48) months prior to notice of the termination of the retail agreement;

(7) Any inventory which was ordered by the dealer on or after the date of notification of termination of the retail agreement; and

(8) Any inventory which was acquired by the dealer from a source other than the supplier that is a party to the retail agreement that is being terminated.

SECTION 10.

(a) If any supplier fails or refuses to repurchase and pay the dealer for any inventory covered under the provisions of this part within sixty (60) days after shipment of such inventory, such supplier shall be civilly liable for one hundred percent (100%) of the current net price of the inventory, plus any freight charges paid by the dealer, the dealer's attorney fees, court costs and interest on the current net price computed at the legal interest rate from the sixty-first day after date of shipment.

(b) A dealer may bring an action for civil damages in a court of competent jurisdiction against any supplier found violating any of the provisions of this part, and

may recover damages sustained as a consequence of the supplier's violations, together with all costs and attorneys' fees.

(c) The dealer shall be entitled to injunctive relief against unlawful termination, cancellation, nonrenewal or substantial change of competitive circumstances of the retail agreement.

(d) The remedies in this section are in addition to any other remedies permitted by law.

SECTION 11.

(a) In the event of the death of the dealer or the majority stockholder of a corporation operating as a dealer, the supplier shall, at the option of the heir or heirs, repurchase the inventory from the heir or heirs of the dealer or majority stockholder as if the supplier had terminated the contract. The heir or heirs shall have one (1) year from the date of the death of the dealer or majority stockholder to exercise their options under this part. Nothing in this part shall require the repurchase of any inventory if the heir or heirs and the supplier enter into a new contract retail agreement to operate the retail dealership.

(b) A supplier shall have ninety (90) days in which to consider and make a determination upon a request by a family member to enter into a new retail agreement to operate the retail dealership. As used herein, "family member" means a spouse, child, son-in-law, daughter-in-law or lineal descendant of the dealer or principal owner of the dealership. In the event the supplier determines that the requesting family member is not acceptable, the supplier shall provide the family member with a written notice of its determination with the stated reasons for non-acceptance. This section does not entitle an heir, personal representative or family member to operate a dealership without the specific written consent of the supplier.

(c) Notwithstanding the provisions of this section, in the event that a supplier and a dealer have previously executed an agreement concerning succession rights prior to the dealer's death and, if such agreement has not been revoked, such agreement shall be observed even if it designates someone other than the surviving spouse or heirs of the decedent as the successor.

SECTION 12. The provisions of this part shall not be construed to affect in any way any security interest which the supplier may have in the inventory of the dealer, and any repurchase hereunder shall not be subject to the provisions of the bulk sales law. The dealer and supplier shall furnish representatives to inspect all parts and certify their acceptability when packed for shipment. Failure of the supplier to provide a representative within sixty (60) days shall result in automatic acceptance by the supplier of all returned items.

SECTION 13. The provisions of this part shall apply to all contracts and shall apply to all retail agreements in effect which have no expiration date and are a continuing contract, and shall apply to all other contracts entered into, amended, extended, ratified or renewed after January 1, 2007. The provisions of this part shall apply to and be binding upon all suppliers, all successors in interest or purchasers of assets or stock of suppliers, and all receivers, trustees or assignees of suppliers.

SECTION 14.

(a) The provisions of this part shall not be waivable in any contract, and any such attempted waiver shall be null and void.

(b) Any contractual term restricting the procedural or substantive rights of a dealer under this part, including a choice of law or choice of forum clause, is void.

(c) If any provision or item of this part or the application thereof is held invalid, it shall not affect other provisions, items or applications of this part which can be given

effect without the invalid provisions, items or applications, and to this end the provisions of this part are hereby declared severable.

SECTION 15.

(a) Franchise agreements are included in the definition of retail agreements in this part. Although all franchise agreements are considered retail agreements, not every retail agreement constitutes a franchise. Where a relationship qualifies as a franchise under the part 15, the provisions of part 15 of this chapter shall apply to such franchises. Part 15 of this chapter shall not apply to the retail agreements contained in this part unless such agreement constitutes a franchise.

(b) The provisions of this part are remedial and supplementary to any other law of this state which provides rights and protections to franchisees.

(c) The provisions of this part which provide procedural or substantive protection to any party to a franchise agreement prior to termination or nonrenewal of such franchise agreement shall be effective and supplementary to part 15 of this chapter, where applicable.

(d) In the event a conflict with respect to franchises exists between the provisions of part 15 and this part, part 15 of this chapter shall control.

SECTION 16. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 17. This act shall take effect July 1, 2007, the public welfare requiring it.